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September 20, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Reply to Opposition of Wilburn."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 
John W. Hunter

By: 
Stephen T. Helverton

Enclosure

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SEP 20 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

MM Docket No. 93-107

File Nos. BPH-911230NA

through

BPH-911231MB

To: Administrative Law Judge
Walter C. Miller

REPLY TO OPPOSITION OF WILBURN

Respectfully submitted,

MCHAIR & SANFORD, P.A.

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September 20, 1993

B:CATOW.110

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REPLY TO OPPOSITION OF WILBURN

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c)(1) of the Commission's Rules, hereby submits this reply to opposition. On August 23, 1993, ORA filed a motion to enlarge the issues against Wilburn Industries, Inc. ("WII"). On September 8, 1993, WII filed an opposition thereto. On that same date, it also filed an erratum to the opposition. In reply to the opposition, ORA submits the following comments.

Financial Qualifications Issue

At the time of certification, neither principal of WII prepared a written budget or cost estimates (CWW Dep. Tr. 21, 48-49). A written budget was not actually prepared until May 1993 (BPW Dep. Tr. 34-35).

In its opposition to the motion to enlarge the issues, at p. 3, WII claims that Charles Wilburn prepared a memo to Bernard Wilburn, which it contends constitutes something akin to cost estimates. Although WII suggests that this memo was prepared before certification of its application in December 1991, it fails to make any affirmative claim as to exactly when the memo was actually prepared.

This failure by WII to pinpoint the date the memo, in question, was prepared mandates the conclusion that WII either does not know when the memo was prepared, or that it was prepared after certification in December 1991. Indeed, Bernard Wilburn, the recipient of the memo, conceded at his deposition that a written budget was not prepared until May 1993.

Moreover, WII's attempt, at n. 1 of the opposition, to change Charles Wilburn's deposition testimony by claiming that he initially forgot about the memo to Bernard Wilburn must be rejected as self-serving and not credible. Accordingly, WII has not only failed to demonstrate that it prepared written cost estimates at the time of certification in December 1991, but Bernard Wilburn has conceded that any such written cost estimates were not in existence at the time of certification.

At the time of certification, the principals of WII had not prepared or shown to each other their personal financial statements. In its opposition to the motion to enlarge the issues, at p. 3, WII concedes to this fact. It then

pleads in a lengthy exposition that such documentation (including cost estimates) at the time of certification is unnecessary.

WII's arguments would have merit only if its application had been filed on or prior to June 26, 1989. However, Commission policy now requires that an applicant prepare at the time of certification written documentation showing cost estimates for construction and the first three months of operation and to document the sources of funding to meet such estimates. See, Revision of FCC Form 301, 50 RR2d 381, 382 (1981); FCC Form 301 Instructions (1989-1992 version), Section III (D)(1)(b), pages 5-6; Revision of FCC Form 301, 4 FCC Rcd 3853, 3859-3860, paras. 43, 46, 49, 52 (1989); Las Americas Communications, Inc., 1 FCC Rcd 786, 788, para. 10 (Rev. Bd. 1986), written documentation is the sine qua non for financial qualifications; Northampton Media Associates, 4 FCC Rcd 5517, 5519, paras. 18-19 (1989), all applications filed on or after June 26, 1989, must have written documentation of their financial qualifications prepared at the time of certification.

WII, in its opposition, at p. 7, pleads that the requirement of written documentation at the time of certification elevates form over substance. However, WII must argue this policy matter with the Commission and not with the Presiding Judge.

The Commission has determined that, as a matter of policy, applicants must have written documentation in hand at the time of certification and that this requirement is to be strictly construed. The penalty for this dereliction is disqualification. What WII did after certification, or what it can reconstruct after the fact, is legally irrelevant. Accordingly, the failure of WII to prepare written cost estimates and to document its sources of funding at the time of certification requires the specification of a financial qualifications issue, and ultimately its disqualification.

EEO Abuse of Process Issue

The WII application, as filed on December 30, 1991, proposed to employ more than five full-time employees. However, no Equal Employment Opportunity ("EEO")

program was submitted with the application at that time. Charles Wilburn conceded at his deposition that it was not filed then because he did not have time to do it and in any event he did not know how to fill it out (CWW Dep. Tr. 18-19). The EEO program, which was eventually submitted by WII, was based entirely upon the EEO programs of the competing applicants. Bernard Wilburn went to the Westerville public library and copied the information contained in the applications on file. No independent research or inquiry was made by WII in this respect (CWW Dep. Tr. 54-55).

In its opposition to the motion to enlarge the issues, at pp. 7-9, WII contends that the mere failure to file an EEO program with an application does not render the application defective or unacceptable for filing. However, WII misses the point. The issue is not whether the application is defective and thus subject to dismissal under the "hard look" policy or some other processing line requirement. Rather, the issue is abuse of process.

In his deposition testimony, Charles Wilburn admitted to an abusive intent in not submitting the EEO program at the time of initial filing of the application. Charles Wilburn admitted that he knew that the EEO program was required to be filed, but that he intentionally decided not to file it because he did not have enough time and did not know how to prepare it. However, the Commission expects far more of applicants than to cavalierly flaunt filing requirements related to public interest obligations of the utmost priority.

WII, in its opposition, at p. 8, attempts to belittle and trivialize the Commission's EEO application requirements as merely "fill in the blanks." However, what WII fails to understand is that an applicant which plagiarizes another applicant's EEO program and just rotely fills in the blanks demonstrates that it is not serious about its EEO obligations, but is only going through a meaningless gesture just to obtain a lucrative Federal license.

Accordingly, an EEO abuse of process issue must be specified against WII. See, David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1261 (D.C. Cir. 1992), an

abuse of process can take many varied forms. Here, WII's abusive intent has been admitted to on the record.

The Commission imposes stringent EEO requirements on broadcast licensees and considers a violation of these rules a serious breach of a licensee's responsibilities. See, e.g., Spectacor Broadcasting, L.P., FCC 93-395, rel. August 20, 1993. Based upon WII's past conduct, the Commission can not expect WII to take seriously its EEO obligations. Accordingly, it can not be entrusted as a steward of a valuable public trust.

WHEREFORE, in view of the foregoing, ORA requests that financial qualifications and EEO issues be specified against WII. It failed to prepare at the time of certification written documentation required by Commission policy and it admitted to an abusive intent with respect to the Commission's EEO policies and requirements.


Respectfully submitted,

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September 20, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 20th day of September, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of Wilburn" to the following:

The Honorable Walter C. Miller*
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